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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL MOTORS CORPORATION,
Petitioner,

v.

LEE M. THOMAS, Administrator,
United States Environmental Protection Agency,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent's brief in opposition serves in many respects to confirm the need for this Court to grant certiorari to review the D.C. Circuit's decision below. Respondent's brief acknowledges a substantial conflict among the lower courts regarding the two major issues of administrative law presented by GM's petition. Moreover, respondent's attempt to apply the law followed in other circuits to the instant facts only demonstrates that this case is an appropriate vehicle for the resolution of these critical issues.

A. Respondent's Arguments Confirm The Need For Review By This Court.

Respondent's brief is most revealing for the points it implicitly concedes or declines to address. First, EPA never disputes the existence of a conflict among the circuits over the test for distinguishing between legislative and interpretative rules. Br. Opp. at 6-7. EPA also accepts GM's contention, and the conclusion of many commentators and lower courts, that the absence of definitive guidance on this issue has created "considerable confusion" in the lower courts. Br. Opp. at 6; Pet. at 10-11 & n.9.

As for the second issue GM's petition presents—the conflict over the applicable standard of judicial review for interpretative rules—EPA's arguments actually magnify the need for granting certiorari. In particular, respondent argues that the D.C. Circuit was correct in applying to a regulation it treated as interpretative the highly deferential standard of judicial review articulated in *Chevron* v. *NRDC*, 104 S. Ct. 2778 (1984). Rather than demonstrate the absence of the conflict among the circuits regarding the applicability of *Chevron*,[1] respondent simply chooses sides

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[1] EPA's attempt to distinguish the First and Second Circuit cases is less than faithful to the decisions of those courts. Br. Opp. at 11 n.5. *Capitano* v. *Secretary of Health & Human Services*, 732 F.2d 1066, 1075-76 (2d Cir. 1984), did directly involve an interpretative rule, and as an indication of the issue's significance, the court specifically explained that *Chevron* did

[Footnote continued]

over how the conflict should be resolved. In so doing, the government indicates it will seek to extend *Chevron*'s mandatory deference standard to interpretative rules nationwide, even though the position respondent advocates conflicts with decisions by the First and Second Circuits.

Finally, respondent tacitly acknowledges that the combination of the D.C. Circuit's interrelated holdings on the legislative-interpretative distinction and the standard of review issues, contravenes the scheme of the Administrative Procedure Act. The congressional rationale for exempting interpretative rules from notice and comment safeguards has been that, "as merely interpretations of statutory provisions . . . [they] are subject to plenary judicial review," receiving only so much deference as their persuasive power warrants. APA Leg. Hist., S. Doc. 248, 79th Cong., 2d Sess. 18 (1946); Pet. at 22-25. But the holdings below, allowing agency regulations addressing legislative policy issues to be classified as interpretative *and then* affording such rules the mandatory level of special deference articulated in *Chevron* produces a truly inequitable exclusion: the public and regulated parties are barred from participating in and informing agency decisionmaking yet are also deprived of an independent determination on judicial review. Such a total exclusion of affected parties violates both fundamental fairness and the purposes of the Administrative Procedure Act.[2] *See also* Reply App. A (letter of Professor Kenneth Culp Davis).

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not "change [the court's] result since we do not have a legislative regulation here." *Id.* at 1076. Presumably the government would not have preferred the use of the *Chevron* standard on rehearing in *Capitano* had the government not felt *Chevron*'s mandatory deference standard would change the result. Similarly, while the context in the second case EPA attempts to distinguish was broader than the review of an interpretative rule, *New England Telephone & Telegraph Co.* v. *Public Utilities Comm'n*, 742 F.2d 1, 11 (1st Cir. 1984), the First Circuit there did unambiguously reject the extension of *Chevron* to the type of issues addressed in interpretative rules.

[2] *See* Brief for the Motor Vehicle Manufacturers Association as *Amicus Curiae* in Support of Petition at 4-9 (April 9, 1985).

B. Under The Tests Applied By Other Courts Of Appeals, EPA's May 30 Regulation Would Be Considered Legislative.

EPA's principal response to GM's first issue is to argue that the May 30 regulation would be considered "interpretative" and upheld even under the alternative tests followed by other circuits. This response is not surprising coming from appellate counsel, but it also does not reflect a fair application of the factors discussed in GM's petition.

In particular, respondent asserts that if congressional intent is the test, the May 30 regulation must be interpretative because the regulation said no more than what Congress expressly intended. Br. Opp. at 6-7. However, the statutory language certainly does not establish the congressional intent respondent asserts. Section 207(c)(1) must be read in conjunction with the 5 year/50,000 mile useful life limitation of § 202(d)(1), and the Court of Appeals opinions identified at least four possible views of the repair obligation under this statutory language. Pet. at 16-18; *see* App. B-43 to B-46 (Wilkey, J., concurring in panel decision). Respondent's assertion is also contradicted by EPA's concession when it promulgated the May 30 regulation that "[t]he legislative history of the Act offers little guidance" regarding the scope of the recall repair remedy. 45 Fed. Reg. at 36397; App. E-5. *See also* Pet. at 16-18 & n.21.

In short, accepting *arguendo* EPA's and the Court of Appeals' characterization, there was no actual congressional intent to guide the choice among the different views of the § 207(c)(1) repair obligation articulated by the parties and the Court of Appeals judges. The very point of the discussion in GM's petition is that regulations adopted to fill such gaps where no congressional intent exists must be legislative, not interpretative. Pet. at 13-14, 17-18; *see* App. B-35 (Bazelon, J., for panel majority).

Respondent contends second that the May 30 regulation would not be legislative under the alternative tests because the only policy determinations reflected in the regulation were already made by Congress. This contention is difficult

to credit given Congress' silence on the issue. In fact, the fundamental policy underlying Congress' 5 year/50,000 mile useful life limitation runs contrary to EPA's regulation. *See* § 202(d)(1); Pet. at 3-4. In any event, the Court of Appeals majority upheld the May 30 regulation on the basis of respect for "the policy choices *of administrative agencies*" and "*EPA* policy." App. A at 8-11 & n.7, 11-12 & n.8, 13, 17, 20-22 (emphasis added). Evidently the court below did not share the view that Congress made the policy choices.

Finally, respondent suggests that the May 30 regulation does not have the "substantial impact" of a legislative regulation, as that factor has been applied by other circuits. But respondent does not dispute GM's estimate that the May 30 regulation would increase *fourfold* the number of vehicles to be repaired in this recall. Pet. at 28; Br. Opp. at 8-9 & n.3. This impact reflects the axiomatic consequence, in this and future recalls, of the agency's decision to override the 5 year/50,000 mile useful life limitation Congress enacted in § 202(d)(1). Thus, this substantial increase in manufacturers' obligations is attributable directly to EPA, and not to Congress.

In sum, GM submits that the conflict over the tests for distinguishing between legislative and interpretative rules is squarely presented by the facts of this case, and that the tests applied in other circuits would have required invalidating EPA's May 30 regulation for failure to allow notice and comment.

C. The Extension Of *Chevron* To Interpretative Rules Is An Issue Only This Court Can Resolve.

Respondent's initial response to the second issue presented—whether the standard of judicial review articulated in *Chevron* v. *NRDC* extends to "interpretative" rules—is to argue that the *Chevron* standard must apply to *all* rules. The consequences of giving *Chevron* such sweeping effect are so far-reaching for the review of agency action,

that GM submits the government's position here is an additional reason to grant the petition for certiorari.

Interpretative rules traditionally have been accorded varying degrees of deference upon judicial review, based on a series of factors explained in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Pet. at 22-23. A court must "substitute" its own independent judgment if the agency's view expressed in an interpretative rule is not persuasive. *Batterton* v. *Francis*, 432 U.S. 416, 425 & n.9 (1977); 2 K. Davis, *Administrative Law Treatise* §§ 7:10, 7:13 (2d ed. 1979). By contrast, legislative regulations have been entitled to a consistently high level of deference, in recognition that agencies are the delegated decisionmakers with respect to legislative regulations. 2 K. Davis, *supra*, § 7:8 ("the law [is] deeply established that the scope of review of interpretative rules is greater than for legislative rules"); *see id.* §§ 7:10, 7:13; Pet. at 10, 22-23. GM does not contend, as respondent suggests, that *Chevron* "established new law" for the review of *legislative* regulations. Br. Opp. at 10.[3] But *Chevron* would represent a dramatic change in administrative law if its mandatory high level of deference extends to *interpretative* rules, as respondent contends and the court below held.

Prior to *Chevron* and the decision below, for example, the D.C. Circuit had distinguished between legislative and interpretative rules in determining the applicable standard of review.[4] At least the First and Second Circuits have adhered to that view and rejected the extension of *Chevron* to interpretative rules. Pet. at 25-26; *see* page 1 & n.1,

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[3] *Chevron*'s standard of review has been invoked or implicated in approximately forty Court of Appeals decisions alone during the past year. Many of those decisions do appear to reflect the view that *Chevron* required an especially deferential standard of judicial review. *See, e.g.*, *Texas* v. *United States*, No. 84-4086 (5th Cir., April 4, 1985); *Washington* v. *EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985); *Rettig* v. *Pension Benefit Guaranty Corp.*, 744 F.2d 133, 140-41, 150-52 (D.C. Cir. 1984).

[4] *See, e.g.*, *Chrysler Corp.* v. *EPA*, 600 F.2d 904, 916 (D.C. Cir. 1979); *British Caledonian Airways, Ltd.* v. *CAB*, 584 F.2d 982, 995 (D.C. Cir. 1978).

supra. In addition, contrary to the government's position here, the rationale of the Court in *Chevron* does not carry over to the review of interpretative rules. Pet. at 24-25. Moreover, while a majority of the Court did not need to address this question in *CMA* v. *NRDC*, 105 S. Ct. 1102 (Feb. 27, 1985), Justices Marshall, Blackmun, Stevens and O'Connor concluded there that "*Chevron*'s deference requirement . . . was explicitly limited to cases in which congressional intent cannot be discerned." *Id.* at 1121 (dissenting opinion). This understanding would exclude interpretative rules by definition.

Accordingly, GM submits that the D.C. Circuit's decision and respondent's position extending *Chevron* to interpretative rules do represent "new law," which conflicts with the decision of this Court and other circuits, and necessitates plenary review.

D. Contrary To Respondent's Rationalization, EPA's Regulation Was Upheld Based Upon The Improper Application Of *Chevron*'s Highly Deferential Standard Of Review.

Respondent contends secondarily that the D.C. Circuit's extension of *Chevron* may not have affected the outcome of this case. This contention is nothing more than the "*post hoc* rationalizations" of appellate counsel, who is charged with defending agency action and preserving the highest level of deference possible. *MVMA* v. *State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2870 (1983).

As respondent appropriately concedes, the majority below upheld EPA's May 30 "interpretative" rule based on *Chevron*'s mandatory and highly deferential standard of review. Nowhere did the majority apply the *Skidmore* factors or the lower level of deference they entail. By comparison, the dissenting judges did apply the *Skidmore* analysis and found that EPA's regulation could not be sustained under *Skidmore* as an interpretative rule. Pet. at 23-24. The importance of the *Chevron* issue to the result here could scarcely be demonstrated more clearly. For just as the Court found in *Chevron*, the degree of deference accorded determined the result on review. *See also Texas* v.

United States, No. 84-4086 (5th Cir., April 4, 1985) (upholding ICC interpretation based on *Chevron* standard "even though—absent such requisite deference to the Commission's construction—this panel may well have decided" otherwise).

E. Respondent's Justification For The May 30 Regulation Further Demonstrates That The Agency Should Have Proceeded By Legislative Rulemaking.

Respondent concludes its brief by defending the merits of the May 30 regulation. This argument bears little response at this point, except to the extent it supports the need for review by this Court.

Respondent's discussion of the merits ironically accuses GM of wanting to rewrite the statute, but it was EPA that took it upon itself to insert the phrase "*regardless of their age or mileage* at the time of repair," which nowhere appears in the statutory text. *Compare* § 207(c)(1) *with* 40 C.F.R. § 85.1803 Appendix A (emphasis added). Similarly, the term "class-based" that respondent uses in explaining a manufacturer's repair obligation can not be found in the § 207(c)(1) description of the vehicles to be remedied.

Respondent's discussion of the policy considerations EPA invoked when the agency hastily adopted the regulation to resolve the dispute during the Cadillac recall, Br. Opp. at 14, moreover, simply emphasizes EPA's initial mistake of ignoring the APA's procedural requirement that regulations predicated on an agency's balancing of significant policy considerations be adopted only through legislative rulemaking. Procedural fairness and reasoned decisionmaking require that when an agency makes a regulation which imposes onerous new requirements, the affected parties should have the opportunity to comment on that rule, its implications and the underlying rationale. *See* Reply App. A (letter of Professor Kenneth Culp Davis).

CONCLUSION

A writ of certiorari should be granted to review the judgment and decision of the Court of Appeals for the D.C. Circuit.

Respectfully submitted,

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APPENDIX A

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April 12, 1985

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Dear Mr. Weber:

I have reviewed the petition for certiorari you sent me in No. 84-1098, *General Motors Corp.* v. *Thomas,* the government's brief in opposition, and the Court of Appeals' opinions below. The main idea in the government's brief is easy to answer. The brief rests on the main idea, stated at page 7, that "the May 30 rule did not create any new rights or duties" and that "EPA's May 30 rule did not, and did not purport to involve any significant policy determination not already made by Congress."

The very *facts* of this case—even the facts in the form stated at pages 3 and 4 of the government's brief—rebut that main idea, for the facts clearly show that neither the petitioner nor the EPA knew what the statute required before the May 30 rule was issued. Initially, according to page 3 of the brief, petitioner in 1975 submitted a plan for voluntary recall of 1975 Cadillacs. For two years, EPA and petitioner negotiated, and EPA did not approve the plan. Then in 1979 EPA did at last approve the plan. Thereupon petitioner raised the question about vehicles beyond their five-year/50,000 mile useful lives, and EPA in 1980 issued the May 30 rule, the effect of which was partially to disapprove the plan that EPA had previously approved.

EPA, by fluctuating during the 1975-80 period from approval to disapproval to partial approval of petitioner's plan, clearly demonstrated that the question of what plan should or should not be approved could not be answered by merely looking at the statute.

On the more specific question of whether vehicles beyond their useful life should be included in the plan, the statute was completely silent. *Such vehicles could be either included or excluded without violating the silent statute.* For all that appears, neither Congress nor anyone in Congress had any intent of any kind on the question whether vehicles beyond their useful life must be expensively repaired even if the vehicles have little or no value. For all that appears, no one in the EPA had an answer to that question before the EPA issued its rule on May 30, 1980. Even the specialist agency that had the responsibility fluctuated in trying to answer the question.

When the EPA issued its May 30 rule, it was for the first time creating law on the question of what to do about vehicles beyond their useful life. The May 30 rule was clearly in the nature of *new law.*

The new law embodied in the May 30 rule imposed an onerous requirement, and compliance with the requirement would be very expensive to the petitioner.

A rule imposing such an onerous requirement is precisely the kind of rule for which § 553 of the Administrative Procedure Act requires notice and comment procedure. Yet the EPA issued the rule without using notice and comment procedure.

The fundamental principle of administrative law is that procedural fairness requires that when an agency makes a rule that imposes an onerous new requirement, those on whom the requirement is imposed should ordinarily have opportunity to comment on a proposed rule, in order that the agency may be aware of the impact of the requirement,

and in order that the agency may take into account the reasons against the onerous new requirement.

Although interpretative rules are a necessary administrative tool, and although interpretative rules usually may be properly used without notice and comment procedure, interpretative rules without notice and comment procedure are the wrong tool for imposing an onerous new requirement.

The Supreme Court should adhere to the requirement imposed by § 553 of the Administrative Procedure Act. It should hold that an agency which imposes an onerous new requirement through a rule must use notice and comment procedure. The statute so requires and fairness so requires.

Sincerely yours,

/s/ KENNETH CULP DAVIS

cc: Edward W. Warren, Esq.